

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the Cable Television)	
Consumer Protection and Competition)	
Act of 1992)	
)	
Development of Competition and Diversity)	MB Docket No. 07-29
in Video Programming Distribution:)	
Section 628(c)(5) of the Communications)	
Act:)	
)	
Sunset of Exclusive Contract Prohibition)	

To: The Commission

REPLY COMMENTS



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I. Introduction and Summary.

ACA members need access to vertically integrated programming at fair and reasonable prices, terms and conditions to deliver competitive programming packages to consumers. Nearly all commenters agree – eliminating the protections of Section 628(c)(2)(D) would harm competition and threaten the continued viability of small and medium-sized cable operators and other MVPDs without significant programming interests.

ACA files this reply to highlight the overwhelming support for the extension of Section 628(c)(2)(d). Further, ACA supports proposals to extend program access protections by:

- Eliminating the “terrestrial loophole”;
- Applying Section 628(c)(2)(D) to all MVPDs, including DBS providers; and
- Prohibiting all exclusive programming arrangements.

In addition, ACA also supports proposals designed to protect MVPDs against abuses of market power in the program access complaint process by:

- Allowing continued carriage of programming while a program access complaint is pending;
- Setting a time period for resolution of program access complaints; and
- Adopting binding arbitration as a means to resolve program access complaints.

II. The record supports an extension of Section 628(c)(2)(D) to protect competition and diversity in the distribution of video programming.

The record affirms that the Commission has ample statutory authority to extend Section 628(c)(2)(D). Commenters concur with ACA that Section 628(c)(2)(D) protections are “necessary to preserve and protect competition and diversity in the distribution of video programming.”¹

As the record indicates, without Section 628(c)(2)(D), the overwhelming market power wielded by the major MSOs, DBS, and phone companies would harm competition and diversity in markets served by ACA members. Commenters from all facets of the cable industry, including small and medium-sized cable operators, small telephone companies, overbuilders and other small MVPD providers, demonstrate that the elimination of the program access safeguards will significantly harm their ability to compete.² In addition, even well

¹ 47 USC 648(c)(2)(D); *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Notice of Proposed Rulemaking*, MB Docket No. 07-29, Comments of the Broadband Service Providers Association (filed Apr. 2, 2007) (“BSPA Comments”); Comments of the Coalition for Competitive Access to Content (filed Apr. 2, 2007) (“CA2C Comments”); Comments of DirecTV (filed Apr. 2, 2007) (“DirecTV Comments”); Comments of Eatel Video (filed Apr. 2, 2007) (“Eatel Comments”); Comments of Echostar (filed Apr. 2, 2007) (“EchoStar Comments”); Comments of the National Rural Telecommunications Cooperative (filed Apr. 2, 2007); Comments of the National Telecommunications Cooperative Association (filed Apr. 2, 2007) (“NTCA Comments”); Comments of the Organization for the Promotion and Advancement of Small telecommunications Companies and the Independent Telephone and Telecommunications Alliance (filed Apr. 2, 2007) (“OPASTCO Comments”); Comments of RCN (filed Apr. 2, 2007) (“RCN Comments”); Comments of the Rural Independent Competitive Alliance (filed Mar. 30, 2007) (“RICA Comments”); Comments of Qwest (filed Apr. 2, 2007); Comments of SureWest (filed Apr. 2, 2007) (“SureWest Comments”); Comments of the US Telecom Association (filed Apr. 2, 2007); Comments of Verizon (filed Apr. 2, 2007) (“Verizon Comments”).

² *BSPA Comments* at 4-6; *CA2C Comments* at 9-10; *RCN Comments* at 8-12; *SureWest Comments* at 2; *Eatel Comments* at 1.

financed MVPDs – including DBS and Verizon – claim that the elimination of Section 628(c)(2)(D) will harm their ability to compete.³

No legitimate argument supports reducing small and medium-sized cable operators' ability to access "must have" satellite programming. The claims of those opposed to an extension of Section 628(c)(2)(D) – that competition from DBS and the phone companies renders Section 628(c)(2)(D) obsolete⁴ – do not adequately address the specific risks to competition and program diversity in the smaller and rural markets served by ACA members. These claims conveniently ignore the Commission's acknowledged role to ensure that as many MVPDs as possible remain viable distributors of video programming.⁵

To ensure that markets served by small and medium-sized cable operators continue to have access to vertically integrated programming, the Commission must extend Section 628(c)(2)(D).

III. The record supports additional conditions that are necessary to protect competition and diversity in the distribution of video programming.

ACA supports the following additional proposals raised on the record:

³ *DirecTV Comments* at 5; *EchoStar Comments* at 11; *Verizon Comments* at 5.

⁴ *Cablevision Comments* at 11; *Comcast Comments* at 5-10.

⁵ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, ¶ 62 (2002) ("*Sunset Report and Order*") ("[O]ne of Congress' express findings in enacting the 1992 Cable Act was that '[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.' These provisions persuade us that, in considering whether to retain the exclusivity prohibition, our primary focus should be on preserving and protecting diversity in the distribution of video programming -- i.e., ensuring that as many MVPDs as possible remain viable distributors of video programming.").

- Eliminating the “terrestrial loophole”;
- Applying Section 628(c)(2)(D) to all MVPDs, including DBS providers; and
- Prohibiting all exclusive programming arrangements.

We discuss each of these in turn below.

A. The Commission must eliminate the terrestrial loophole.

Numerous commenters call for the elimination of the terrestrial loophole.⁶

ACA supports this.

Several developments have increased the need for the Commission to retain the prohibitions since the Commission extended Section 628(c)(2)(D) in 2002. One of these developments – the entry of Verizon and AT&T into the video marketplace – underscores the importance of Section 628(c)(2)(D) for small and medium-sized cable operators. Because of their entrance into the video marketplace, Verizon and AT&T will have the same incentive to acquire and withhold programming from its competitors as any other MVPD.⁷

Even more significantly, Verizon & AT&T are likely to deliver vertically integrated programming terrestrially. Advancements in technology since the Commission established the terrestrial loophole have made wide range terrestrial delivery of programming a realistic alternative. These advancements in

⁶ *BSPA Comments* at 17-18; *RICA Comments* at 4-5; *SureWest Comments* at 4-5.

⁷ 47 USC 648(c)(2)(D); *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Notice of Proposed Rulemaking*, MB Docket No. 07-29, Comments of the American Cable Association at 8-9 (filed Apr. 2, 2007) (“*ACA Comments*”).

technology will allow Verizon and AT&T and other large MVPDs to circumvent the program access protections of Section 628(c)(2)(D).

The Commission must not allow vertically integrated programmers to use these advancements in technology to circumvent the terrestrial loophole. ACA supports commenters' proposals that the Commission should close the terrestrial loophole.

B. The Commission must apply safeguards like those contained in Section 628(c)(2)(D) to all MVPDs, including DBS.

ACA concurs with RCN that "must have" programming is essential to competition and that exclusive arrangements act as a barrier to entry.⁸ The Commission must address the growing use of exclusive arrangements and apply safeguards like those contained in Section 628(c)(2)(D) to all MVPDs, including DBS.

It is well-settled that DirecTV and EchoStar are now the dominant MVPDs in many smaller and rural markets.⁹ Because of their substantial market power, DBS providers have the same incentives to withhold programming from its competitors as a cable provider.

When DBS obtains "must have" exclusive programming, ACA members find themselves at a clear disadvantage.¹⁰ The lack of access to vertically

⁸ *RCN Comments* at 17.

⁹ *ACA Comments* at 11 (*citing 2005 Annual Video Competition Assessment*, Comments of the American Cable Association at 3-4 (filed Sept. 19, 2005); *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189 (2006), Comments of the American Cable Association at 2 (filed Nov. 29, 2006)).

¹⁰ *ACA Comments* at 12.

integrated programming can hinder the small and medium-sized cable operator's ability to compete against DBS, harming competition in the small and medium-sized markets that the operators serve.

The Commission must extend safeguards like those contained in Section 628(c)(2)(D) to all MVPDs, including DBS.

C. The Commission must prohibit all exclusive programming arrangements.

ACA supports the comments of SureWest asking the Commission to investigate exclusive MVPD contracts for national sports programming and consider seeking legislative authority if the Commission believes it has insufficient authority to address such contracts.¹¹ ACA also supports RCN's position that the Commission prohibit all exclusive programming arrangements.¹²

As we explain above, the Section 628(c)(2)(D) protections "are necessary to preserve and protect competition and diversity in the distribution of video programming."¹³ Exclusive programming arrangements threaten diversity and harm consumers by allowing vertically integrated programmers to buy their way out of competition. This harms the ability of small and medium-sized cable operators' ability to compete, especially those without programming interests.

¹¹ *SureWest Comments* at 9-10 ("[T]he Commission should investigate in this proceeding, exclusive MVPD contracts for national sports programming, and consider seeking explicit legislative authority to address the anti-competitive impact of such exclusive contracts if it believes that its authority under Title VI of the Communications Act is insufficient.")

¹² *RCN Comments* at 17.

¹³ 47 USC § 548(c)(5).

The Commission needs to examine the impact of exclusive programming arrangements on competition and small and medium-sized cable operators and prohibit these arrangements. As the Commission has noted, these companies are especially at risk and deserving of special protection.¹⁴

IV. Numerous commenters highlight the need for procedural reform.

The record provides solid support for the Commission to reform the Program Access complaint procedures.¹⁵ The Commission should implement the following proposals:

- Allowing continued carriage while a program access complaint is pending;
- Setting a specific time period for the Commission to resolve program access complaints; and
- Adopting binding arbitration as a means to resolve program access complaints.

We discuss each of these in turn below.

A. The Commission must allow an operator to continue carriage while a program access complaint is pending.

To protect against temporary foreclosure strategies, ACA supports BSPA's proposal that the Commission allow an MVPD to continue carriage pending resolution of the complaint proceeding.¹⁶

¹⁴ *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd. 473, ¶ 176 (2004) ("News Corp. Order").

¹⁵ *BSPA Comments* at 7-16; *CA2C Comments* at 21-24; *EchoStar Comments* at 14-18; *NTCA Comments* at 6; *OPASTCO Comments* at 8; *RCN Comments* at 18; *Verizon Comments* at 15-17.

¹⁶ *BSPA Comments* at 15.

In News Corp./DirecTV, the Commission refused to allow News Corp. to deauthorize carriage after an MVPD chose to avail itself of the arbitration condition.¹⁷ The Commission imposed this arbitration remedy to “constrain News Corp.’s increased incentive to use temporary foreclosure strategies during carriage negotiations.”¹⁸

Vertically integrated programmers covered by the program access rules have the same incentives to use temporary foreclosure strategies during negotiations. To negate these incentives, the Commission must allow an MVPD to continue carriage pending resolution of the complaint proceeding.

B. The Commission must set a specific time period for it to resolve program access complaints.

ACA supports proposals to establish a specific time period for the Commission to resolve program access complaints.¹⁹

Despite Section 628’s specific requirement that the Commission provide for expedited review of program access complaints,²⁰ the Commission has yet to establish a firm deadline to resolve program access complaints.²¹ As a result, program access complaints can drag on for years.²² Without such a specific time

¹⁷ *News Corp. Order*, ¶ 175.

¹⁸ *Id.*, ¶ 173.

¹⁹ *CA2C Comments* at 21-22; *Verizon Comments* at 15-16.

²⁰ 47 USC 548(f)(1).

²¹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Petition for Rulemaking of Ameritech New Media, Report and Order, 13 FCC Rcd 15822, ¶ 41 (1998).

²² *CA2C Comments* at 21 (“Unfortunately, rather than complaints being resolved in the five to nine month timeframe envisioned in the *1998 Program Access Report and Order*, the timeframe

period, MVPDs can withhold programming and force small and medium-sized cable operators to divert precious resources to a prolonged dispute resolution process.

To keep an MVPD with vertically integrated programming from prolonging program access complaints indefinitely, the Commission must resolve program access complaints within a set time period.

C. The Commission must adopt binding arbitration for Program Access complaints.

ACA supports Echostar's and BPSA's proposals that the Commission adopt binding commercial arbitration.

The Commission has previously imposed binding arbitration in News Corp./DirecTV and Comcast/Adelphia/Time Warner.²³ As ACA described in the recent Liberty/DirecTV proceeding, ACA members report that the News Corp./DirecTV conditions have brought a measure of stability to Fox-affiliated retransmission consent and RSN renewals.²⁴

Binding arbitration would bring a measure of stability to program access negotiations as well. The Commission should follow the recommendations of

for resolution is uncertain, with complaints often taking years to resolve after the preliminary filings.”).

²³ *News Corp. Order*, ¶ 175, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors and Transferors, Comcast Corporation and Time Warner Inc., Assignees and Transferees*, 21 FCC Rcd 8203, ¶ 156 (2006).

²⁴ *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket No. 07-18, Comments of the American Cable Association at 14 (filed Mar. 23, 2007)

commenters in this proceeding and adopt binding arbitration modeled on News Corp./DirecTV and Comcast/Adelphia/Time Warner.²⁵

Each of these proposals streamlines and improves the Program Access complaint process. ACA supports these proposals and asks the Commission to adopt them.

V. Conclusion

The record supports the need for the Commission to extend Section 628(c)(2)(D). ACA members need access to vertically integrated programming at fair and reasonable prices, terms and conditions to deliver competitive programming packages to consumers. Further, the Commission must impose the additional proposals outlined in ACA's Comments and on the record.

Respectfully submitted,
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²⁵ *News Corp. Order*, ¶ 176.